Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 2)

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(L)-289–12 OF 2021(W), 05(L)-290–12 OF 2021(W) AND 05(L)-291–12 OF 2021(W)

TENGKU MAIMUN CHIEF JUSTICE, ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, MARY LIM AND MOHAMAD ZABIDIN FCJJ

23 AUGUST 2022

Criminal Procedure — Judge — Application to recuse judge — Appellant in Federal Court criminal appeal applied to recuse judge from the coram — Appellant claimed Facebook posting made by judge's husband four years earlier could have prejudiced judge's opinion about the appellant — Whether when Facebook posting was made no criminal case existed against the appellant — Whether mere fact of spousal relationship was in itself insufficient to ascribe views held by spouse to the judge hearing the appeal — Whether spousal connection by itself could not give rise to real danger of bias whether actual or apparent — Whether appellant failed to show nexus between Facebook posting and the subject-matter of the appeal

During the course of hearing of the instant appeals, the appellant, a former Prime Minister of Malaysia, applied to recuse the Chief Justice ('CJ') from continuing to hear the appeals and for the appeals to be re-heard before a different panel of the court. The reasons for the application were: (a) a Facebook posting made on 11 May 2018 by the CJ's husband, Zamani bin Ibrahim (in which he allegedly expressed glee that the appellant had been toppled as Prime Minister in the 14th General Election held on 9 May 2018); and (b) a letter from the Bar Council Malaysia stating that the CJ had no objections if lawyers applied to adjourn their cases to attend a Walk for Judicial Independence ('the Walk') on 17 June 2022 organised by the Council to show support for the trial judge who had heard the appellant's trial and convicted and sentenced him on seven criminal charges, against which the instant appeals were about. The Walk was to protest against the Malaysian Anti-Corruption Commission's investigation of the trial judge following accusations that he should not have presided over the appellant's trial due to certain conflict-of-interest issues. The respondent submitted that the recusal application was mala fide and deliberately made to scuttle the hearing of the appeals as the Facebook posting happened four years ago while the Walk took place three months ago. The appellant contended that since the respondent failed to file an affidavit in reply to the recusal application, the truth of the matters stated therein were deemed to be admitted.

Held, unanimously dismissing the recusal application:

(1) **(per Tengku Maimun Chief Justice)** Just because the respondent did not file an affidavit in reply did not mean that the legal threshold for bias and recusal had been met. The absence of an affidavit in reply was immaterial because recusal was essentially a question of law (see para 4).

(2) **(per Tengku Maimun Chief Justice)** In *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220, the Federal Court affirmed that in order to recuse a judge, the test was the 'real danger of bias' test. Based on decided cases, the appellant had failed to satisfy the test (see paras 5–6).

(3) **(per Tengku Maimun Chief Justice)** It was held by the Federal Court of Australia in *Kaycliff Pty Ltd v Australian Broadcasting Tribunal and Another* (1989) 18 ALD 782 ('Kaycliff') that the views of a spouse of a judge could not in itself be used as a ground to recuse the judge. And in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal in considering the 'real danger of bias' test noted that '... where the judge's interest is said to derive from the interest of a spouse, partner or other family member, the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself ...' (see paras 7–9).

(4) **(per Tengku Maimun Chief Justice)** In proving the 'real danger of bias' test, it had to be shown that the views expressed by the third party, in this case, the spouse, actually impacted on the views of the judge sought to be recused as opposed to simply presupposing that just because certain general views were expressed (by the spouse) as a citizen, they were automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' was not by itself a reason to ascribe the spouse's views to the judge. Applying *Kaycliff* to the instant recusal application, it followed that: (a) the fact of spousal connection in itself did not give rise to either actual or apparent bias; and (b) there was no nexus between the Facebook posting and the subject matter of the instant appeals. The Facebook posting occurred four years ago when the instant case was not even in existence (see paras 11–13).

(5) **(per Tengku Maimun Chief Justice)** The appellant's reliance on the Bar Council's letter was a non-starter. The letter did not refer to a blanket grant of adjournments. It was simply to say that the different panels and different chairs retained their discretion to grant or refuse adjournments. It was a standard letter. This ground did not disclose any fear or real danger of bias sufficient to recuse the CJ (see para 14).

(6) **(per Abang Iskandar CJ (Sabah and Sarawak), Nallini Pathmanathan, Mary Lim and Mohamad Zabidin FCJJ, supporting)**

The Facebook posting complained of happened four years ago. There was no live case at the time of the said posting. The appellant had not even been charged then. There could therefore be no nexus between that posting and the current appeals (see para 17).

(7) **(per Abang Iskandar CJ (Sabah and Sarawak), Nallini Pathmanathan, Mary Lim and Mohamad Zabidin FCJJ, supporting)** The recusal application lacked bona fides, given the series of applications that were filed by the appellant in installments and with staggered timing. The recusal application had no merits whatsoever and had to be dismissed (see para 18).

[Bahasa Malaysia summary

Dalam perjalanan pendengaran rayuan-rayuan di sini, perayu, seorang bekas Perdana Menteri Malaysia, memohon agar Ketua Hakim Negara ('KHN') tidak mendengar rayuan-rayuan dan agar rayuan-rayuan didengar semula di hadapan panel yang berbeza mahkamah. Alasan permohonan adalah: (a) satu paparan Facebook yang dibuat oleh suami KHN pada 11 Mei 2018, Zamani bin Ibrahim (yang mana dikatakan menunjukkan kegembiraan bahawa perayu telah dijatuhkan sebagai Perdana Menteri dalam Pilihanraya Umum ke-14 yang diadakan pada 9 Mei 2018); dan (b) satu surat daripada Majlis Peguam Malaysia ('Majlis tersebut') yang menyatakan bahawa KHN tiada bantahan sekiranya peguam memohon untuk menangguhkan kes mereka untuk menghadiri satu Walk for Judicial Independence ('perarakan tersebut') pada 17 Jun 2022 yang dianjurkan oleh Majlis tersebut untuk menunjukan sokongan mereka kepada hakim bicara yang mendengar perbicaraan perayu dan mendapatinya bersalah dan menjatuhkan hukuman atas tujuh pertuduhan jenayah, yang merupakan hal perkara rayuan ini. Perarakan tersebut adalah untuk membantah terhadap siasatan Suruhanjaya Pencegahan Rasuah Malaysia terhadap hakim bicara atas pengataan bahawa dia tidak sepatutnya mendengar perbicaraan perayu atas beberapa isu percanggahan konflik. Responden menghujahkan bahawa permohonan tersebut adalah mala fide dan dibuat dengan sengaja untuk melengahkan pendengaran rayuan kerana paparan Facebook tersebut dibuat empat tahun lalu dan perarakan tersebut berlaku tiga bulan lalu. Perayu mengatakan bahawa kerana responden gagal untuk memfailkan afidavit balasan terhadap permohonan tersebut, perkara yang dinyatakan didalamnya adalah dianggap diakui.

Diputuskan, sebulat suara menolak permohonan tersebut:

(1) **(oleh Tengku Maimun Ketua Hakim Negara)** Hanya kerana responden tidak memfailkan afidavit jawapan tidak bermaksud keperluan undang-undang untuk bias dan pengenepian telah dipenuhi. Ketiadaan afidavit jawapan adalah tidak material kerana pengepian adalah satu persoalan undang-undang (lihat perenggan 4).

(2) **(oleh Tengku Maimun Ketua Hakim Negara)** Dalam Pendakwa Raya lwn *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220, Mahkamah Persekutuan telah mengekalkan bahawa untuk mengenepikan seorang hakim, ujian adalah 'real danger of bias'. Berdasarkan kes yang telah diputuskan, perayu telah gagal untuk memenuhi ujian tersebut (lihat perenggan 5–6).

(3) **(oleh Tengku Maimun Ketua Hakim Negara)** Ianya diputuskan oleh Mahkamah Persekutuan Australia dalam *Kaycliff Pty Ltd v Australian Broadcasting Tribunal and Another* (1989) 18 ALD 782 ('Kaycliff') bahawa pendapat seorang pasangan hakim tidak dengan sendirinya digunakan sebagai alasan untuk mengenepikan seorang hakim. Dan dalam *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 Mahkamah Rayuan di England dalam menimbangkan ujian 'real danger of bias' memutuskan bahawa '... di mana kepentingan hakim dikatakan datang daripada kepentingan seorang pasangan, atau seorang ahli keluarga lain, hubungan tersebut mestilah sangat rapat dan terus untuk menyebabkan kepentingan individu lain tersebut, untuk semua sebab praktikal, tidak boleh dibezakan daripada kepentingan hakim tersebut ...' (lihat perenggan 11–13).

(4) **(oleh Tengku Maimun Ketua Hakim Negara)** Dalam membuktikan ujian 'real danger of bias', ianya mesti ditunjukkan bahawa pandangan yang dikeluarkan oleh pihak ketiga, dalam kes ini, pasangannya, akan memberi kesan keapda pandangan hakim yang dipohon untuk diketepikan dan bukannya hanya menyangka bahawa hanya kerana beberapa pandangan umum diketengahkan (oleh pasangan) sebagai seorang warganegara, ianya adalah secara automatik pandangan hakim yang bersidang. Dalam kata lain, fakta hubungan suami isteri bukan satu alasan untuk menyamakan pandangan pasangan tersebut kepada hakim tersebut. Mengguna pakai *Kaycliff* kepada permohonan mengetepikan ini, ianya dikatakan bahwa: (a) fakta hubungan suami isteri tersebut tidak menimbulkan kepada bias sebenar atau jelas; dan (b) tiada nexus antara paparan Facebook tersebut dan hal perkara rayuan ini. Paparan Facebook tersebut berlaku empat tahun lalu apabila kes ini masih belum wujud (lihat perenggan 11–13).

(5) **(oleh Tengku Maimun Ketua Hakim Negara)** Kebergantungan perayu kepada surat Majlis Peguam adalah bukan satu isu yang boleh dimulakan. Surat tersebut tidak merujuk kepada pembenaran penangguhan secara umum. Ianya hanya menyatakan bahawa panel berbeza dan pengerusi berbeza masih mempunyai budi bicara untuk membenarkan atau menolak penangguhan. Ianya adalah surat umum. Alasan ini tidak menunjukan apa-apa kekhuatiran benar bias untuk menegepikan KHN (lihat perenggan 14).

(6) **(oleh Abang Iskandar CJ (Sabah dan Sarawak), Nallini**

Pathmanathan, Mary Lim dan Mohamad Zabidin HHMP, menyokong) Paparan Facebook tersebut berlaku empat tahun lalu. Tiada kes wujud pada masa paparan tersebut. Perayu masih belum dituduh pada masa itu. Oleh itu, tiada nexus diantara paparan tersebut dan rayuan ini (lihat perenggan 17).

(7) **(oleh Abang Iskandar CJ (Sabah dan Sarawak), Nallini Pathmanathan, Mary Lim dan Mohamad Zabidin HHMP, menyokong)** Permohonan penegepian tersebut tiada bona fide, mengambil kira isi permohonan yang difailkan oleh perayu secara ansuran dan pada masa yang berbeza. Permohonan penegepian tersebut tiada merit dan harus diketepikan (lihat perenggan 18).]

Cases referred to

Kaycliff Pty Ltd v Australian Broadcasting Tribunal and Another (1989) 18 ALD 782, FC (folld)

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65, CA (refd)

PP v Tengku Adnan bin Tengku Mansor [2020] 5 MLJ 220, FC (refd)

United Cabbies Group (London) Ltd v Westminster Magistrates' Court [2019] EWHC 409 (Admin), QBD (refd)

Hisyam bin Abdullah @ Teh Poh Teik (with Kee Wei Lon and Low Wei Loke) (Hisyam Teh) for the appellant.

V Sithambaram (with Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul and Manjira Vasudevan) (Attorney General's Chambers) for the respondent.

Tiu Foo Woei (Azri, Lee Swee Seng & Co) watching brief for Bar Council.

Tengku Maimun Chief Justice:

DECISION ON ENCL 300: RECUSAL

[1] The appellant, during the course of the hearing of these appeals, has filed an application to recuse me from hearing these appeals and for the appeals to be reheard before a different panel. The application is presented in encl 300.

[2] The grounds in support of the application are firstly, a Facebook post dated 11 May 2018 by my husband, Zamani bin Ibrahim and secondly, a letter from the Bar Council of Malaysia stating that I, as Chief Justice, had no objection if lawyers would apply for adjournments to attend an event called *Walk of Justice* on 17 June 2022 relating to Justice Nazlan.

[3] The respondent submits that this application is mala fide and filed deliberately to scuttle the progress of these appeals as the two grounds relied by

the appellant relate to events that happened four years and three months ago respectively. A

[4] It was contended by the appellant that since no affidavit in reply was filed, the truth of the contents of the exhibits are not in dispute. In my view, that does not mean that the legal threshold for bias and recusal has been met. The absence of an affidavit in reply is immaterial because recusal is essentially a question of law. B

[5] The Federal Court, in *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220, has recently affirmed that in order to recuse a judge the test is the 'real danger of bias test'. C

[6] The question is whether the grounds of the application to recuse successfully raise a real danger of bias. It is my view, based on decided cases, that the test has not been established. D

[7] The first ground seeks to associate the views of my husband made four years ago in his Facebook such that it has now raised the alarms of a real danger of bias. There is a case directly on this point, that is, the judgment of the Federal Court of Australia in *Kaycliff Pty Ltd v Australian Broadcasting Tribunal and Another* (1989) 18 ALD 782 ('Kaycliff'). This case stands for the proposition that the views of a spouse of a judge cannot in itself be used as a ground for recusal. E F

[8] In that case, it was argued, among other things, that the chairman of the tribunal in that case ought to have been recused because of certain views expressed by her husband publicly elsewhere. The Federal Court unanimously held that this did not raise any suspicion of bias and in so holding, said as follows: G

> The primary judge expressed the view that: '... it would be wrong to conclude that a casual statement by a husband of his views on a matter under consideration by a tribunal of which his wife is a member gives rise to a reasonable apprehension that the husband's views might have been formed after discussion with his wife, or might be communicated to his wife'. H
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> We agree. Although we have found no authority directly bearing on the point, it appears to us that statements made outside and without the authority of a court or a tribunal by persons who are not its members cannot, in general, disqualify it from proceeding. Persons of considerable public credibility may on occasions make gratuitous statements as to a court's or a tribunal's established attitudes, perhaps even as a stratagem to create embarrassment. We think there are dangers in accepting the doctrine that statements of that kind can prejudice the right or affect the duty of a judge or tribunal member to sit. I

[9] In another case called *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal, in considering the 'real danger of bias test', noted as follows:

> 10. ... In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.

[10] See also: *United Cabbies Group (London) Ltd v Westminster Magistrates' Court* [2019] EWHC 409 (Admin).

[11] Thus, in proving the real danger of bias test, it must be shown that the views expressed by third party, in this case, the spouse, actually impacted on the views of the judge sought to be recused as opposed to simply presupposing that just because certain general views were expressed as a citizen they are automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's views to the judge.

[12] Applying *Kaycliff* to encl 300, it follows that: (a) the fact of spousal connection in itself does not give rise to either actual or apparent bias; and (b) there is no nexus between the Facebook posting and the subject matter of these appeals.

[13] Again, it is reiterated that the Facebook posting occurred four years ago when this case was not even in existence. Simply put there is absolutely no nexus between the Facebook post and the present appeals.

[14] The second ground, the letter, is a non-starter. The letter clearly states that I had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retain their discretions to grant or refuse adjournments. It was a standard letter. I do not see how this discloses any fear or real danger of bias sufficient to recuse me.

[15] Finally, the fact that certain other judges recused themselves in cases involving the appellant in this case does not itself present a reason for me to recuse myself in this case.

[16] In the circumstances, encl 300 is without merit and is dismissed.

Abang Iskandar CJ (Sabah and Sarawak), Nallini Pathmanathan, Mary Lim and Mohamad Zabidin FCJJ:

SUPPORTING DECISION ON ENCL 300: RECUSAL

[17] Following on from what was just stated by the learned Chief Justice, on behalf of myself and the other members of the coram, we concur and wish to just reiterate the following. The event complained of in the first ground in encl 300, in particular, happened four years ago. And there was no live case at the time of the Facebook post. The appellant had not even been charged. There can therefore be no nexus between that posting and the current appeals.

[18] We further agree with the respondent's submission, for the reasons advanced, that this application in encl 300 is lacking in bona fides, given the series of applications filed in instalments and the staggered timing. We therefore reiterate that there are no merits whatsoever in the application and we would also dismiss encl 300.

Application for recusal dismissed.

Reported by Ashok Kumar